Calendar No. 295

101ST CONGRESS *1st Session*	SENATE	REPORT 101-165

HATCH ACT REFORM AMENDMENTS OF 1989

REPORT

together with

MINORITY VIEWS

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 135

TO AMEND TITLE 5, UNITED STATES CODE, TO RESTORE TO FEDERAL CIVILIAN EMPLOYEES THEIR RIGHT TO PARTICIPATE VOLUNTARILY, AS PRIVATE CITIZENS, IN THE POLITICAL PROCESSES OF THE NATION, TO PROTECT SUCH EMPLOYEES FROM IMPROPER POLITICAL SOLICITATIONS, AND FOR OTHER PURPOSES

OCTOBER 17 (legislative day, SEPTEMBER 18), 1989.—Ordered to be printed

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101ST CONGRESS
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SENATE

REPORT
101-165

HATCH ACT REFORM AMENDMENTS OF 1989

OCTOBER 17 (legislative day, SEPTEMBER 18), 1989.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 135]

The Committee on Governmental Affairs, to which was referred the bill (S. 135) to amend Title 5, United States Code, to provide for Federal civilian employees to participate voluntarily, as private citizens, in the political processes of the Nation, to protect such employees from improper political solicitations, and for other purposes, reports favorably thereon.

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I. PURPOSE

The purpose of S. 135 is to provide for Federal civilian employees to participate voluntarily, as private citizens, in the political processes of the Nation and to protect such employees and the General citizenry from improper political solicitations.

S. 135 would retain and strengthen current law prohibitions against political activity "on the clock"—on Government time and in Government premises. It would broaden the current law to also provide Federal citizens and postal employees the opportunity to participate voluntarily in political activities as private citizens "off the clock" with two exceptions: it would continue current law prohibitions against running for partisan elective office and against solicitation of political contributions from the general public.

II. Background

For more than a century, the idea that Federal employees should not be involved in partisan politics has been a fundamental civil service feature. This concept of neutrality was formalized in the Hatch Act, a wide ranging prohibition on political participation, which was passed in 1939. The Act represents the culmination of repeated efforts, which began in the early days of the nation, to establish a nonpartisan civil service. An underlying rationale for this idea is that efficiency in Government service requires a lack of partisanship in administration.

Most histories of the issue cite a congressional attempt in 1791 "to prevent Inspectors [of distilled spirits], or any officers under them, from interfering, either directly or indirectly, in elections, further than giving their own votes," as an early effort to separate civil servants from politics.[1] This amendment, which had been introduced in the House of Representatives on January 21, 1791, failed to pass by a vote of 37–21.[2]

Ten years later, President Thomas Jefferson addressed the principle of political neutrality in an Executive Circular. According to the Chief Executive, "the right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others, nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." [3]

Following the Civil War, at a time when political patronage was supreme, a Civil Service Reform Movement developed which sought to substitute "merit" or "training" for party allegiance. This effort culminated with passage of the Civil Service Act of 1883, commonly referred to as the Pendleton Act and a landmark reform bill.[4] While the Pendleton Act is widely recognized as establishing the principle of civil service appointment based on merit and without regard to political considerations, it also prohibited political assessments, removals, and coercion. Additionally, political activity by Federal employees covered by the Act was barred from Government premises. A Civil Service Commission was created to administer the Act.

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[1] 2 Annals of Congress 1877, p. 1876.
[2] Ibid., p. 1877.
[3] Rosenbloom, David H. Federal Service and the Constitution: The Development of the Public Employment Relationship, Ithaca, New York: Cornell University Press, 1971. pp. 39–40.
[4] 22 United States Statutes at Large, Chapter 27.

Civil Service Rule I, promulgated on May 7, 1883, under the authority of the Pendleton Act, prohibited merit system employees from "using [their] official authority or influence either to coerce the political action of any person or body or to interfere with any election." [5] An amendment to that rule was issued by President Theodore Roosevelt in a 1907 Executive order which expanded the prohibition to provide that, "no person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof." [6] The amendment went on to specify that, "persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns." [7] This rule served as the forerunner to the Hatch Act.

Despite these attempts to ensure the nonpartisanship of Federal employees, a neutral civil service was still not a reality; Civil Service Rule I covered only those employees in the classified service. During the Administration of President Franklin D. Roosevelt, however, the Federal "bureaucracy became more powerful and more central to the political life of the nation." [8] By the end of 1934, more than 60 new Federal agencies had been created but only five had been placed under the jurisdiction of the Civil Service Commission. The majority of these agencies were being staffed through patronage rather than merit.

This circumstance, as well as political events of the time, contributed to the passage of the Hatch Act in 1939. The salaries of employees in the Works Progress Administration were being illegally assessed and workers were being coerced to fund a senatorial campaign. This procedure became widely publicized through the release of an investigatory report by the Senate Special Committee to Investigate Senatorial Campaign Expenditures and use of Government funds. Another concern, which spurred passage of the Hatch Act, was that President Roosevelt would try to gain reelection in 1940 with the support of Federal employees beholden to him.

Following submission of the Special Committee report, Senator Carl Hatch, on March 20, 1939, introduced S. 1871, a bill to prevent pernicious political activities. This measure, commonly known as the Hatch Act, was signed into law on August 2, 1939. The measure has passed the Senate, with little deliberation, by voice vote on April 13, 1939, and the House by a vote of 241–134 on July 20, 1939. Debate in the House focused on the prohibition against Federal employees taking an active part in political management or political campaigns. The Hatch Act (53 Stat. 1147) folded in some 3,000 administrative determinations of the Civil Service Commission with regard to political activities.

Section 9(a) is widely regarded as the heart of the Act. That section states that it is unlawful for any Federal employee to use his official authority or influence to interfere with an election or affect

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[5] Richardson, James. Messages and Papers of the Presidents, Vol. 8, New York: Bureau of National Literature, 1899, p. 161.
[6] Executive Order No. 642, June 3, 1907.
[7] Ibid.
[8] Rosenbloom, Federal Service and the Constitution, p. 103.

its outcome. The section goes on to say that Federal employees may not take an active part in political management or political campaigns.

Until 1978, the Civil Service Commission administered the Hatch Act. With passage of the Civil Service Reform Act (P.L. 95-454) in 1978, however, authority for carrying out the Act was transferred to the Office of the Special Counsel (OSC) of the Merit Systems Protection Board. The OSC has published a list of activities which are permitted and prohibited under the Act. With regard to acceptable political activity, Federal employees may, among other things, register and vote as they choose, privately express opinions about candidates and issues, and contribute money to political organizations. Federal employees are not, however, allowed, among other prohibitions, to solicit contributions for or endorse candidates in partisan elections, be candidates themselves in partisan elections, or distribute campaign material in partisan elections.

The Hatch Act has been the subject of intensive scrutiny throughout its history. On two occasions, the Supreme Court has considered the constitutionality of the Act and both times upheld the law. In 1947, in *United Public Workers* v. *Mitchell,* the Court said that if the President and Congress thought that Government efficiency was best achieved by having politically neutral civil servants that it had no constitutional objection.[9]

Again, in 1973, in *National Association of Letter Carriers* v. *United States Civil Service Commission,* the Supreme Court held that the law was passed to ensure that employment and advancement in the Government not be based on political performance and that Federal workers would not be pressured to be politically active. The Court left the door ajar with this decision, however, for Congress to "strike a different balance than it has." [10]

Another evaluation of the Act was conducted in 1966 by the Commission on Political Activity of Government Personnel which was created by Congress and charged with the task of extensively studying the question of Hatch Act reform. The Commission report recommended that the Act be clarified. It concluded that the Hatch Act was confusing, ambiguous, restrictive, and negative in character.[11] Among the changes which the Commission recommended were that limitations on political activity be clearly and specifically stated, that political participation, beyond those limitations, be permitted as fully for Federal employees as for all other citizens, and that the law on coercing public servants to participate in politics be strengthened.[12]

State and local Government employees, whose positions were funded in whole or in part by Federal monies, were prohibited from being politically active when the Hatch Act was amended in 1940.[13] With the passage of Public Law 93-443 in 1974, however,

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[9] 330 U.S. 75 (1947)

[10] 413 U.S. 548 (1973).

[11] Report of Commission on Political Activity of Government Personnel, Vol. I, Findings and Recommendations, Washington: U.S. Govt. Print. Off., 1968, p. 19 and Jones, Charles O. Reevaluating the Hatch Act: A Report on the Commission on Political Activity of Government Personnel, Public Administration Review, May/June, 1969, pp. 249-254.

[12] Report of Commission on Political Activity of Government Personnel, pp. 18-26.

[13] Stat. 767.

Congress lifted most of these restrictions but, retained those which prohibited running for elective office in a partisan campaign and the use of coercion.

The only other legislation designed to liberalize the Hatch Act which reached the President's desk was developed in 1975 and early 1976. Both the House and Senate passed Hatch Act reform measures which were quite similar to H.R. 3400; the House, by a vote of 288–119, on October 21, 1975, and the Senate by a vote of 47–32, on March 11, 1976. President Ford vetoed the legislation, however, in a message dated April 12, 1976. In his veto statement, President Ford emphasized that "pressure could be brought to bear on Federal employees in extremely subtle ways beyond the reach of any anti-coercion statute so that they would inevitably feel compelled to engage in partisan political activity." [14] The House attempt to override the veto failed by a vote of 243–160, on April 29, 1976.

Several events combined to make amendment of the Hatch Act a major Civil Service issue in the 100th Congress. During the 1984 Presidential election the Presidents of three major Federal and Postal employee unions endorsed Walter Mondale's candidacy for the Presidency and in their union newsletters encouraged their memberships to vote for him. The unions involved were the American Federation of Governmnet Employees, the National Association of Letter Carriers, and the American Postal Workers Union. All three presidents had been on leave from their Government jobs for more than 16 years. Nevertheless, the Office of Special Counsel brought suit against these men, asserting that they had violated the prohibition against active political participation. The Merit Systems Protection Board upheld the OSC finding and penalized the three presidents by suspending them from their jobs for 60 days. But, because they have been on leave from those jobs, the suspension had no effect. The Board's decision was viewed as a way of establishing the principle of the case. Another concern for the unions was an OSC advisory opinion which said that if a Federal union had already endorsed a Presidential or congressional candidate, Federal employees who were union members could not be sued to conduct voter registration drives.

On appeal in two Federal circuit courts, the Merit Systems Protection Board's order was reversed on findings that no Hatch Act violations had occured. *Blaylock* v. *United States Merit Systems Protection Board,* 851 F.2d 1348 (11th Cir. 1988); *Morris Biller and Vincent R. Sombrotto* v. *United States Merit Systems Protection Board,* No. 87–4076, slip op. (2d Cir. Dec. 16, 1988). Despite requests from the Merit Systems Protection Board and the Office of Personnel Management to appeal the court decisions to the Supreme Court, the Office of the Solicitor General declined the invitation.

The prosecution of Biller, Blaylock, and Sombrotto, on grounds which had never before been asserted, raised the issue of partisan enforcement of the Hatch Act. A number of Members of Congress pointed out that the intent of the Hatch Act was to prevent politi-

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[14] Public Papers of the President of the United States, Gerald R. Ford, Book II, Washington, U.S. Govt. Print. Off., 1976–1977, p. 1115.

cal coercion in the work place. Yet, employee coercion was not at issue in the actions of these three union presidents.

Finally, the vagueness of the statute continues to generate much concern. As one witness testified before the Governmental Affairs Committee:

> We cannot advise our members with confidence since advisory opinions of the Special Counsel are not subject to judicial review. It is only after employees jeopardize their jobs that a determination is made on whether an activity is permitted under the Hatch Act. Many decisions are not published and so are not readily available, resulting in an inability to ascertain the precise extent of prohibited and protected activities or the penalties involved.[15]

III. Legislative History

Legislation to amend the Hatch Act was introduced in the House of Representatives in the 100th Congress by Representative Clay. It was referred to the Subcommittee on Civil Service, where hearings were held. Subsequently, it was marked up by the Committee on Post Office and Civil Service and reported to the full House. H.R. 3400 was passed by the House on November 17, 1987 by a vote of 305–112.

H.R. 3400 was then sent to the Senate and referred to the Governmental Affairs Committee, where hearings were held on February 23rd and 24th. On May 19, 1988, a committee amendment in the nature of a substitute to H.R. 3400 was approved by the Committee on Governmental Affairs by a vote of 9–3. Unlike the House-passed legislation, the Governmental Affairs Committee substitute bill continued current law prohibitions against running for partisan elective office and against solicitation of political contributions from the general public. No further action was taken in the Senate on the bill.

In the 101st Congress, Hatch Act reform legislation was again introduced. On January 3, 1989, Representative Clay introduced H.R. 20, the Federal Employees Political Activities Act of 1989. The bill was identical to Hatch Act reform legislation passed by the House in 1987. It was referred to the House Post Office and Civil Service Committee which ordered the bill favorably reported, with amendments, on April 12, 1989. H.R. 20 was passed by the House on April 17, 1989, by a vote of 297–90 (308 Representatives cosponsored the measure). H.R. 20 was then sent to the Senate and referred to the Senate Governmental Affairs Committee where no further action has been taken.

S. 135, the Hatch Act Reform Amendments of 1989, was introduced by Senator Glenn on January 25, 1989, and referred to the Governmental Affairs Committee. The bill is identical to the Hatch Act reform legislation reported out of the Governmental Affairs Committee last year. The Governmental Affairs Committee held a

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[15] Statement of Vince Sombrotto, President, Fund for Assuring an Independent Retirement (F.A.I.R.) before the Senate Governmental Affairs Committee, July 25, 1989. Hearing to be printed.

hearing on S. 135 on July 25, 1989. The following witnesses provided testimony:

The Honorable Mitch McConnell, United States Senator

Constance Berry Newman, Director, Office of Personnel Management

Edward G. Dennis, Acting Deputy Attorney General, Department of Justice

Mary F. Wieseman, Special Counsel, Office of Special Counsel

Vincent Sombrotto, President and Chairman of the Board, Fund for Assuring an Independent Retirement (FAIR); and President, National Association of Letter Carriers

Moe Biller, President, American Postal Workers Union (FAIR Member Organization)

Proponents of the legislation emphasized the value of political participation by ordinary citizens in a democracy. They observed that the confusion and vagueness of the current Hatch Act tends to discourage federal employees from participating in permitted political activities. They argued that the existing Act is no longer necessary to protect employees from improper pressures from their superiors because the vast majority of federal jobs are now filled under the merit system (by objective criteria) rather than through patronage. They emphasized that both administrative and criminal remedies exist to pursue practices which are offensive to merit system principles. Proponents also noted the positive experience of the states since 1974, when most Hatch Act restrictions were lifted on state and local employees in federally-funded jobs.

Opponents of the legislation were concerned that the civil service must be ever vigilant to the possibility that the career service could be supplanted by appointees rewarded for political favors. They were also concerned that the lawful administration of the Government could be undermined by the improper and partisan use of Government authority or through conflicts of interest. Amending the current law, opponents also believe, would increase the potential for building a powerful political operation based on the use of Government workers and give the civil service a definite political outlook.

On July 26, 1989, S. 135 was approved by the Committee on Governmental Affairs, without amendment, by a vote of 10–4. Voting in the affirmative were Senators Glenn, Nunn, Levin, Sasser, Pryor, Bingaman, Kohl, Lieberman, Stevens and Heinz. Negative votes were cast by Senators Roth, Cohen, Rudman and Wilson. As of October 13, 1989, the bill had 51 Senate cosponsors: DeConcini; Pryor; Stevens; Heinz; Adams; Burdick; Daschle; Dodd; Lieberman; Sanford; Simon; Cranston; Harkin; Biden; Mikulski; Leahy; Riegle; Rockefeller; Conrad; Lott; Exon; Metzenbaum; Levin; Kohl; Heflin; Jeffords; Lautenberg; Dixon; Bingaman; Pell; Hollings; Reid; Bentsen; Bryan; Nunn; Sarbanes; Inouye; Kerrey; Robb; Ford; Gore; Selby; Baucus; Moynihan; Fowler; Kennedy; Bradley; Kerry; Wirth; Breaux; and Durenberger.

IV. Agency Views

The Committee notes the concerns of the Office of Personnel Management (OPM) with S. 135. In testimony before the Committee, OPM argued that the legislation could threaten to result in the repoliticization of the Federal civil service and, with the identification of Federal employees with partisan causes, undermine public confidence in the independence and integrity of the Federal civil service. OPM testified that no one knew how the vast majority of Federal employees felt about the Hatch Act and that Congress should not proceed to consider statutory changes in the protections provided by the Act without knowing the majority opinion.

In addition to OPM, the Department of Justice and the Office of Special Counsel (OSC) voiced opposition to the legislation. The Department of Justice testified that the consequences of its enactment will be detrimental to both federal personnel and federal programs. The Department said there is a risk of subjugating the political freedom of those who have chosen to pursue careers in public service to the partisan agenda of the politically powerful, all to the detriment of the quality and impartiality of federal public administration. OSC testified that enactment would undermine protections currently available to federal employees and adversely affect the integrity of the merit system. OSC said passage of S. 135 would lead inevitably to the intrusion of partisan politics into the federal work-place in direct and indirect ways, including both overt and subtle forms of coercion. OSC also stated it would lead to the erosion of confidence in the integrity of governmental decision-making and processes, and in the efficient delivery of governmental benefits and services.

V. Section-by-Section Analysis

Section 1 designates the Act as the "Hatch Act Reform Amendments of 1989."

Section 2(a) amends Subchapter III of Chapter 73 of title 5, United States Code, which concerns political activities of Federal employees.

Section 7321 states that it is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation.

Section 7322 defines certain terms used in subchapter III of chapter 73.

The term "employee" means any individual employed or holding office in an Executive agency other than the General Accounting Office or in a competitive service position which is not in an Executive agency. The President and Vice President are excluded from the definition of "employee." The term "employee" does not include members of the uniformed services.

[The Department of Defense has written its own restrictions on military political activities which are specified in DOD Directive 1344.10 entitled Political Activities by Members of the Armed Forces. Under section 3(b)(1)(C) of Public Law 96-191, the political

activities which are prohibited under Title 5, Chapter 73, subchapter III are prohibited for General Accounting Office employees.]

The Term "partisan political office" means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but excludes any office or position within a political party of affiliated organization.

The term "political contribution" means any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose; any contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose; any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and the provision of personal services for any political purpose.

["Personal services" includes paid and unpaid services.]

Section 7323 permits employees to take an active part in political management or in political campaigns, except as prohibited. The section prohibits employees from using their official authority or influence to interfere with or affect the result of an election. It also prohibits employees from knowingly soliciting, accepting, or receiving a political contribution from any person unless that person is a member of the same Federal employee organization and the solicitation is for a contribution to the multicandidate political committee of the Federal employee organization. Additionally, the section prohibits employees from running for the nomination or as a candidate for election to a partisan political office.

[The prohibition against coercion includes pressuring employees to attend political functions. Employee groups can solicit contributions from their members for a political action committee (PAC) in accordance with Federal election laws. Such groups are currently allowed to operate PAC's. The prohibition on running for partisan political office is continued except that Federal employees could run for office within party organizations and affiliated groups such as convention delegate.]

Section 7324 prohibits political activities while on duty. Subsection (a) provides that an employee may not engage in political activity while on duty, in any room or building occupied in the discharge of official duties by an employee or office holder of the Government or any agency or instrumentality thereof, while wearing a uniform or official insignia which identifies his office or position, or using any vehicle owned or leased by the Government or any agency or instrumentality, thereof.

[Politics on the job, including the wearing of political buttons, is prohibited. Involvement in politics after work hours is allowed except that the general solicitation of contributions is prohibited.]

Subsection (b) provides that certain high level political appointees may engage in political activity otherwise prohibited by subsection (a) if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States. Employees covered by this section must be in positions in which

the duties and responsibilities continue outside normal duty hours and while away from the normal duty post. Additionally, these employees must be paid from the Executive Office of the President appropriation or be appointed by the President, by and with the advice and consent of the Senate, be in a position which is located within the United States, and be determining policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws.

Section 2(b) makes certain technical and conforming amendments to other provisions of title 5, United States Code. Subsection (b)(1) amends section 3302(2) by deleting references to sections in subchapter III of chapter 73 which have been deleted by this bill.

Subsection (b)(2) conforms the section analysis for subchapter III of chapter 73 of title 5, United States Code, to the amendments made in section 2(a) of the bill.

Section 3 makes certain conforming amendments to title 18, United States Code. Subsection 3(a) amends section 602 of title 18, relating to solicitation of political contributions. Paragraph (a)(3) adds a new subsection (b) to section 602 which provides that the criminal prohibition of solicitation of political contributions applies only to the activity of employees covered under S. 135 to the extent that the activities violate sections 7323 or 7324. Subsection 3(b) makes a similar conforming amendment to section 603 of title 18, concerning making political contributions. A new subsection (c) is added to section 603 which states that the criminal restriction on political contributions applies only to activities of employees covered under the Act to the extent that the activities violate section 7323 or 7324.

Section 4 makes a conforming amendment to the provisions of the Voting Rights Act of 1965 (Public Law 89–110) relating to restrictions on examiners appointed to administer the Voting Rights Act.

Section 5 amends chapter 15 of title 5 United States Code. Subsection 5(a) includes District of Columbia employees under coverage of the chapter. Subsection 5(b) repeals section 675(e) of the Community Services Block Grant Act.

Section 6 provides that employees of the United States Postal Service and of the Postal Rate Commission are covered by the amendments made by section 2 of S. 135.

Section 7 provided that the amendments made by the Act shall take effect 120 days after the date of enactment, except that the authority to prescribe regulations (as added by section 2 of the Act) shall take effect on the date of enactment. Subsection 7(b) provides that the amendments made by the Act shall not affect any penalty imposed or any action to enforce a penalty under the preceding provisions of law. Subsection 7(c) provides that no provision of the Act shall affect any proceedings filed on or before the effective date of the Act. Orders issued in those proceedings or appeals shall be taken as if the Act had not been enacted.

VI. Regulatory Impact of Legislation

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate "the

regulatory impact which would be incurred in carrying out the bill."

The Committee notes that the current Hatch Act incorporates into law more than 3,000 administrative rulings rendered prior to 1940 and that one of the most predominant criticisms of present law is its ambiguity in defining the term "political activity." Because enactment of S. 135 would not result in any additional regulation of individuals and would simplify present law by eliminating conflicting administrative rulings, the Committee anticipates of beneficial regulatory reduction.

VII. Changes in Existing Law

Rule XXVI of the Standing Rules of the Senate requires that changes in existing law made by the bill, as reported, be detailed in the Committee Report accompanying the bill. Changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * * * *

PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

* * * * * * *

CHAPTER 15—POLITICAL ACTIVITY OF CERTAIN STATE AND LOCAL EMPLOYEES

§ 1501. Definitions

For the purpose of this chapter—

(1) "State" means the District of Columbia and a State or territory or possession of the United States;

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PART III—EMPLOYEES

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Subpart B—Employment and Retention

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CHAPTER 33—EXAMINATIONS, SELECTION, AND PLACEMENT

SUBCHAPTER I—EXAMINATION, SELECTION, AND APPOINTMENT

* * * * * * *

§ 3302. Competitive service; rules

The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for—

(1) necessary exceptions of positions from the competitive service; and

(2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, **[**7203, 7321, and 7322**]** *and 7203* of this title.

Each officer and individual employed in an agency to which the rules apply shall aid in carrying out the rules.

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Subpart F—Labor-Management and Employee Relations

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CHAPTER 73—SUITABILITY, SECURITY, AND CONDUCT

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9SUBCHAPTER III—POLITICAL ACTIVITIES

[7321. Political contributions and services.
[7322. Political use of authority or influence; prohibition.
[7323. Political contributions; prohibition.
[7324. Influencing elections; taking part in political campaigns; prohibitions; exceptions.
[7325. Penalties.
[7326. Nonpartisan political activity permitted.
[7327. Political activity permitted; employees residing in certain municipalities.
[7328. General Accounting Office employees.**]**

SUBCHAPTER III—POLITICAL ACTIVITIES

7321. Political participation.
7322. Definitions.
7323. Political activity authorized; prohibitions.
7324. Political activities on duty; prohibition.

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[SUBCHAPTER III—POLITICAL ACTIVITIES

[§ 7321. Political contributions and services

[The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that an employee in an Executive agency or in the competitive service is not obliged, by reason of that employment, to contribute to a political fund or to render political service, and that he may not be removed or otherwise prejudiced for refusal to do so.

[§ 7322. Political use of authority or influence; prohibition

[The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that an employee in an Executive agency or in the competitive service may not use his official authority or influence to coerce the political action of a person or body.

[§ 7323. Political contributions; prohibition

[An employee in an Executive agency (except one appointed by the President, by and with the advice and consent of the Senate) may not request or receive from, or give to, an employee, a Member of Congress, or an officer of a uniformed service a thing of value for political purposes. An employee who violates this section shall be removed from the service.

[§ 7324. Influencing election; taking part in political campaigns; prohibitions; exceptions

[(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

[(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

[(2) take an active part in political management or in political campaigns.

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

[(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

[(c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization.

[(d) Subsection (a)(2) of this section does not apply to—

[(1) an employee paid from the appropriation for the office of the President;

[(2) the head or the assistant head of an Executive department or military department;

[(3) an employee apprinted by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;

[(4) the Mayor of the District of Columbia, the member of the Council of the District of Columbia, or the chairman of the Council of the District of Columbia, as established by the District of Columbia Self-Government and Governmental Reorganization Act; or

[(5) the Recorder of Deeds of the District of Columbia.

[§ 7325. Penalties

[An employee or individual who violates section 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board.

[§ 7326. Nonpartisan political activity permitted

[Section 7324(a)(2) of this title does not prohibit political activity in connection with—

[(1) an election and the preceding campaign of none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

[(2) a question which is not specifically identifed with a National or State political party or political party of a territory or possession of the United States.

For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

[§ 7327. Political activity permitted; employees residing in certain municipalities

[(a) Section 7324(a)(2) of this title does not apply to an employee of The Alaska Railroad who resides in a municipality on the line of the railroad in respect to political activities involving that municipality.

[(b) The Office of Personnel Management may prescribe regulations permitting employees and individuals to whom section 7324 of this title applies to take an active part in political management and political campaigns involving the municipality or other political subdivision in which they reside, to the extent the Office considers it to be in their domestic interest, when—

[(1) the municipality or political subdivision is in Maryland or Virginia and in the immediate vicinity of the District of Columbia, or is a municipality in which the major of voters are employed by the Government of the United States; and

[(2) the Office determines that because of special or unusual circumstances which exist in the municipality or political subdivision it is in the domestic interest of the employees and individuals to permit that political participation.

[§ 7328. General Accounting Office employees

[The preceding provisions of this subchapter shall not apply to employees of the General Accounting Office.]

SUBCHAPTER III—POLITICAL ACTIVITIES

§ 7321. Political participation

It is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation.

§ 7322. Definitions

"For the purpose of this subchapter—

(1) "employee" means any individual, other than the President and the Vice President, employed or holding office in—

(A) an Executive agency other than the General Accounting Office; or

(B) a position within the competitive service which is not in an Executive agency;

but does not include a member of the uniformed services;

(2) "partisan political office" means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but shall exclude any office or position within a political party or affiliated organization; and

(3) "political contribution"—

(A) means any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose;

(B) includes any contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose;

(C) includes any payment by any person, other than a candidate or a political party or affiliated organization, or compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and

(D) includes the provision of personal services for any political purpose.

§ 7323. Political activity authorized; prohibitions

An employee may take an active part in political management or in political campaigns, except an employee may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election;

(2) knowingly solicit, accept, or receive a political contribution from any person, unless such person is—

(A) a member of the same Federal employee organization; and

(B) the solicitation is for a contribution to the multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(A)(4))) of such Federal employee organization; or

(3) run for the nomination or as a candidate for election to a partisan political office.

§ 7324. Political activities on duty; prohibition

(a) An employee may not engage in political activity—

(1) while the employee is on duty;

(2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;

(3) while wearing a uniform or official insignia identifying the office or position of the employee; or

(4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

(b)(1) An employee described in paragraph (2) of this subsection may engage in political activity otherwise prohibited by subsection (a) if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.

(2) Paragraph (1) applies to an employee—

(A) the duties and responsibilities of whose position continue outside normal duty hours and while away from the normal duty post; and

(B) who is—

(i) an employee paid from an appropriation for the Executive Office of the President; or

(ii) an employee appointed by the President by and with the advice and consent of the Senate, whose position is located within the United States, who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws.

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

* * * * * * *

§ 602. Solicitation of political contributions

(a) It shall be unlawful for—

(1) a candidate for the Congress;

(2) an individual selected to or serving in the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(3) an officer or employee of the United States or any department or agency thereof; or

(4) a person receiving any salary or compensation for services from money derived from the Treasury of the United States; [to knowingly solicit, any contribution within the meaning of section 301(8) of the Federal Election Campaign

Act of 1971 from any other such officer, employee, or person. Any person who violates this section shall be fined not more than $5,000 or imprisoned not more than three years, or both.] *to knowingly solicit any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 from any other such officer, employee, or person. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.*

(b) The prohibition in subsection (a) shall not apply to any activity of an employee (as defined in section 7322(1) of title 5) or any individual employed in or under the United States Postal Service or the Postal Rate commission, unless that activity is prohibited by section 7323 or 7324 of that title.

§ 603. Making political contributions

(a) * * *

* * * * * * *

(c) The prohibition in subsection (a) shall not apply to any activity of an employee (as defined in section 7322(1) of title 5) or any individual employed in or under the United States Postal Service or the Postal Rate Commission, unless that activity is prohibited by section 7324 of that title.

* * * * * * *

SECTION 6 OF THE VOTING RIGHTS ACT OF 1965

SEC. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3 (a), or (b), unless a declaratory judgment has been rendered under section 4(a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fourteenth or fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fourteenth or fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fourteenth or fifteenth amendment, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9(a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil

Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by the Civil Service Commission, except [the provisions of section 9 of the Act of August 2, 1939, as amended (5 U.S.C. 118i), prohibiting partisan political activity] *the provisions of subchapter III of chapter 73 of title 5, United States Code, relating to political activities: Provided*, That the Commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

TITLE 42, UNITED STATES CODE

* * * * * * *

(e) POLITICAL ACTIVITIES BY EMPLOYEES OF RECIPIENTS.—[For purposes of chapter 15 of Title 5, any nonprofit private organization receiving assistance under this chapter which has responsibility for planning, developing, and coordinating community antipoverty programs shall be deemed to be a State or local agency. For purposes of clauses (1) and (2) of section 1502(a) of such title, any such organization receiving assistance under this chapter shall be deemed to be a State or local agency.]

* * * * * * *

VIII. COST ESTIMATE OF LEGISLATION

Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office (CBO) has reviewed the cost implications of S. 135. The following is CBO's estimate of the potential costs of this legislation.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 25, 1989.

Hon. JOHN GLENN,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 135, the Hatch Act Reform Amendments of 1989, as ordered reported by the Senate Committee on Governmental Affairs, July 26, 1989. The bill would not result in costs or savings to the federal government, and would not affect the budgets of state or local governments.

S. 135 would allow federal employees to participate in political activities, with certain restrictions. Because the bill would not affect the activities of federal agencies, it is not expected to affect federal spending.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is James Hearn, who can be reached at 226–2860.

Sincerely,

ROBERT F. HALE
(For Robert D. Reischauer).

MINORITY VIEWS OF SENATORS ROTH, COHEN, RUDMAN, AND WILSON

In 1976 President Ford vetoed legislation similar to that reported because it was "bad for the employee, bad for the government, and bad for the public."

This legislation is bad for the federal employee because it unleashes irresistible pressures to become a captive soldier in political armies inside and outside the government.

This legislation is bad for the federal government because it would undercut the neutral, nonpartisan administration of programs by civil servants. It would nourish a working environment where politics replaces merit.

This legislation is bad for the public because it would foster the creation of employee interest groups inside the government that might sabotage the will of the American people. The federal workforce is the servant of the American people, to act as their instrument not as their foil.

Proponents of this legislation ignore the adverse impact of this legislation on the government and on the American people and focus attention exclusively on the federal employee. They would have you believe that the Hatch Act oppresses federal employees and that S. 135 would set them free. The truth is the very opposite. The Hatch Act protects federal employees from inside and outside coercion. And S. 135 would, in practice, restrict their freedom.

A similar debate might be held regarding section 603 of title 18, United States Code. That provision among other things, forbids the Senate staff from making campaign contributions to their respective Senators. This provision, it might be argued, robs Senate staffers of the right to contribute to Senate campaigns, a right enjoyed by the entire American populus except for the oppressed few.

But we all know why this provision was passed and has been retained on the books. Section 603 was not enacted to oppress, or even to trade employee rights for the honor and privilege of government service, but to protect the employee. Were it not for section 603 and similar provisions, it might become "expected" of Senate staffers to make such contributions. Since it is not possible to outlaw expectations, the only way to protect Senate staffers is to prohibit this form of political activity.

Similar expectations will arise if Hatch Act protections are removed. It does little to solve the problem for the legislation reported by the Committee to declare against "coercion."

After two centuries of trial and error, America has come to appreciate the genius of a politically neutral federal workforce responsible to an elected President and his political appointees. This system allows government to be both responsive to popular will yet fair and impartial in the administration of our laws. This system rests squarely upon the Hatch Act. It is the reason why a political-

ly neutral workforce can function subordinate to political appointees without itself becoming politicized. S. 135 is a serious threat to the delicate balance of this much admired system.

In his veto message in 1976, President Ford stated that if legislation like the Committee reported bill became law, "pressure could be brought to bear on Federal employees in extremely subtle ways beyond the reach of any anti-coercion statute so that they would inevitably feel compelled to engage in partisan political activity." In our opinion, this would be the inevitable result of this legislation. Proponents of S. 135 seem oblivious to the expectations, the pressures, and the coercion that will spring forth if this legislation is enacted. They rely on one clause of the bill which tracks verbatim a 1907 Executive Order that "no person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof."

As later history was to show, the 1907 Executive Order did not adequately protect federal employees. Its terms, like the provision in S. 135, do not address expectations. Its terms do not address subtle pressures. Its terms do not address post-election reprisals, whether they are direct or indirect, harsh or subtle, flagrant or disguised. In fact, if you read the provision carefully, it may not even address the outright coercion of a federal employee. Finally, it does not address the expectations, pressures, and coercive efforts directed by non-governmental individuals and groups against federal employees.

These lapses are not the fault of the 1907 Executive Order. That Order was merely an addendum to Civil Service Rule I which prohibited employees from taking "an active part in political management or political campaigns." S. 135 overturns Civil Service Rule I—the fundamental safeguard of employees—and retains the addendum. The addendum was never intended to stand alone. No wonder the employee is left so exposed to political pressure under S. 135!

The point is not only that S. 135 contains a poor formulation of protection for the federal employee but also that no formulation can be adequate once employees are free to engage in partisan political activity including direct involvement in political campaigns. No drafting technique can overcome the proclivities of human nature.

Once federal employees are free to engage in partisan political activity, it will only be human nature for them to believe that it would please their politically appointed superior to exercise their new political rights under S. 135 in a manner that pleases the superior. It will only be human nature for employees to try to get an edge on their competition by engaging in the partisan politics of the superior. It will only be human nature for other employees who had not engaged in the partisan politics of the superior to feel it is necessary to do so to eliminate the edge of their competitors. Since it is only human nature to try to get ahead, employees will engage in political activity pleasing to the political hierarchy.

The Hatch Act has served us well. In spite of all the efforts of Presidents through the years and in spite of all the civil service regulations, we never licked the problem of the spoils system until Congress enacted the Hatch Act in 1939. Since then, the Hatch Act

has protected the federal employee, fostered a more efficient and effective workforce, and enhanced the confidence of the citizenry in the fairness of their government. It has been good for the employee, good for the government, and good for the public.

Why do we now in considering S. 135 risk a return to the spoils system? Why do we risk repealing the only remedy that has worked? Why do we risk undermining the merit system?

Each Senator will have to decide whether there is sufficient cause to scuttle the only effective remedy for the spoils system this nation has known. In addition, it should be noted that there has been no clamor for change. No government-wide polls of government employees have been offered to show their desire for change. In fact, a poll last year in *Government Executive* magazine reveals that over 60% of federal employees *oppose* a loosening of the Hatch Act.

While the Federal employee unions and the postal groups support change, the weight of other testimony given during hearings held by the Committee in the 100th and 101st Congress stands in opposition to this bill. Senior advisors of the Bush Administration, Common Cause, the American Bar Association, the Federal Bar Association, the National Academy of Public Administration, the Chamber of Commerce, and the American Farm Bureau have all voiced strong opposition to this legislation. In addition, scholars and former government officials have likewise opposed the bill.

The central question before us is the quality of government service that the American people should receive and the protection from political pressure that the federal employee should enjoy. That is why organizations not normally outspoken on these types of issues have come forward to voice vigorous opposition to S. 135.

Some have cited First Amendment concerns with the present law. The American Civil Liberties Union testified last year that believe the Hatch Act violates the constitution. However, on more than one occasion, the Supreme Court has specifically rejected the ACLU argument. Thus, there in no constitutional imperative to vote for S. 135. The only constitutional issue before us is the claim of the Administration that S. 135 violates the constitution by unduly restricting the activities of political appointees.

Proponents believe they have answer the problem of how to draw a bright line between permissible and impermissible conduct. They would permit partisan political activity "off duty" and prohibit such conduct "on duty." Simple, isn't it? The problem is that the bright line between on-duty and off-duty has little to do with Hatch Act concerns. As the Federal Bar Association made clear to the committee when it testified last year, the concern is whether expectations, pressures, and coercion are imposed upon the federal employee and not the time of day the employee engages in partisan political activity. The fact that an employee engages in political conduct off-duty does not answer the question whether he has been pressured on-duty.

In addition, few of us would find it appropriate for employees of the Federal Election Commission to engage in partisan politicking at night and serve as umpires over partisan politics by day.

In upholding the constitutionality of the Hatch Act in *United Public Workers, C.I.O.* v. *Mitchell,* 330 U.S. 75 (1947), the Supreme

Court considered the question of off-duty political activity. The majority held that, "We do not find persuasion in appellant's argument that such activities during free time are not subject to regulation even though admittedly political activities cannot be indulged in during working hours. The influence of political activity by government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes after hours." The bright line of "on-duty" and "off-duty" of S. 135 is a mirage.

Proponents also argue that this legislation is not a repeal of the Hatch Act protections, but simply a reform. We disagree. The protections afforded to Federal employees in this legislation are simply redundant of protections already provided in the criminal code, title 18. Instead, the Senate bill removes from the Hatch Act the protections afforded to civil service employees in title 5. The following is an excerpt from the July 25 hearing in which Acting Deputy Attorney General Edward Dennis responds to a question by Senator Roth with regard to whether S. 135 would be "pulling the teeth out of the Hatch Act?"

> Mr. DENNIS. I think so, yes. We view S. 135 as a virtual repeal. I know it is couched in its structure and its title suggests amendments to the Hatch Act, but in our judgment, with those provisions being eliminated that relate to office in a political party and the other very significant election activities that you mentioned would be permitted under S. 135, it eviscerates the Hatch Act to such an extent that we feel it would be an insignificant factor insofar as regulating this critical area. (Attached to the minority views is a letter from the Department of Justice outlining their complete concerns with the legislation).

Finally, the proponents of S. 135 argue that federal employees are confused by the regulations and opinions issued under the Hatch Act. The confusion, it is argued, has a chilling effect of permissible political activity.

While we believe this argument has some merit, we feel that the proponents overstate its case. In upholding the constitutionality of the Hatch Act in *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), the court specifically considered the question of whether the Act was "unconstitutionally vague and overbroad." In response, a majority of the Court held that, " * * * it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they (the prohibitions) are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without serious sacrifice to the public interest."

In fact, the regulations governing what is considered permissible and impermissible political activities can be found in 5 C.F.R. Section 733. There are 13 permissible activities and 16 impermissible activities found in these regulations.

While we agree that federal employees may be confused by what is and is not permissible activity, we must reiterate that we do not believe the regulations are as confusing as the proponents purport them to be. Proponents of reform frequently mention the several

thousand administrative decisions of the former Civil Service Commission which predated the passage of the Hatch Act in 1940, and the effect of these rulings on current interpretation and enforcement of the Act. As the Office of Special Counsel has pointed out, "Some individuals have erroneously referred to these decisions as 'rules' or 'regulations,' creating the false impression that there are some 3,000 rules or regulations currently governing political activity by federal employees. *Such individuals clearly misapprehend the legal and historical significance of those decisions.*"

Rejecting the argument set forth by the National Association of Letter Carriers in the aforementioned case, the Supreme Court ruled that the proper subject of inquiry was not the "several thousand adjudications of the Civil Service Commission," but rather the regulations that were extracted from them. The Court held that, "It is to these regulations (at 5 C.F.R. Section 733) purporting to construe Section 7324 as actually applied in practice, as well as the statute itself . . . that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad."

In addition, we do not understand the logic of the argument that if the implementation of a law is confusing, the law should be repealed. One would hate to see this argument applied to the Bill of Rights, which has for nearly two centuries raised an endless stream of litigation designed to clearify its application. The appropriate response to the argument is to do what is necessary to eliminate the confusion.

Recent Federal Appellate Court cases in the second and eleventh circuits have further clarified the issue of what is and is not permissible political activity. The distinction drawn by the Courts appears very straightforward to us. The Court in *Blaylock* v. *United States Merit System Protection Board,* 851 F.2d 1348 (11th Cir. 1988) held that the Hatch Act's prohibition against taking an "active part in political management or in political campaigns" encompasses only active participation in, on behalf of, in connection with, organized efforts of political parties or partisan committees, clubs, and candidates. In an effort to clarify the existing regulations in light of these Appellate Court decisions, we believe the Office of Personnel Management, in conjunction with the Office of Special Counsel, should promulgate new regulations to clarify the restrictions on political activity. At the July 25, 1989 hearing, these agencies agreed to work together in this effort.

Since our analysis has led us to conclude that the Hatch Act is good for the employee, good for the government, and good for the public and since we believe that claims of confusion over the implementation of the Act have some merit, we propose that in lieu of this legislation the Office of Personnel Management be directed to issue new regulations that would clarify and simplify the guidance that has been given to federal employees with respect to the Hatch Act. We believe that this proposal would satisfy the best argument of proponents for change without risking the benefits of the Hatch Act for American society. Moreover, we are confident that S.135, if passed, would be vetoed. We believe that our proposal, in contrast, would not be.

The choice for the Senate is clear: whether to do some good or whether to make a major mistake.

Proponents of S. 135 suggest that the legislation is a modest proposal. Proponents argue that this bill represents the middle ground between the Administration, on the one hand, and the House passed bill on the other.

S. 135 tracks the House version in all its particulars with only two exceptions. Whereas the House version permits federal employees to engage in virtually any political activity "off-duty," S. 135 would not permit an employee, (1) to run for partisan political office or (2) to solicit campaign contributions except from fellow employee-members of a union or group for their own PAC. While it is true that S. 135 is less drastic, it cannot accurately be called a "mild" or "toned down" change in the Hatch Act.

In order to understand this, one must compare what federal employees may do under the Hatch Act with what they may do under S. 135 and the House version:

WHAT EMPLOYEES MAY DO NOW

1. Register to vote and vote.
2. Contribute money to partisan political campaigns.
3. Express their views in private and in public (though not in a concerted way to elicit support for a candidate or party).
4. Attend conventions and rallies but only as a spectator.
5. Run as an independent candidate in certain partisan contests in designated areas with a high concentration of federal employees.
6. Assist in nonpartisan voter registration drives.
7. Campaign for or against political referendum questions.
8. Participate as a nonpartisan poll-watcher or election judge.
9. Wear buttons (off duty or, subject to various agency restrictions, on duty).
10. Participate in nonpartisan campaigns.

ADDITIONAL ACTIVITIES EMPLOYEES COULD DO UNDER S. 135

1. Hold office in a political party.
2. Distribute campaign literature and solicit votes (off duty).
3. Organize and participate in phone banks (off duty).
4. Organize and participate in political meetings (off duty).
5. Publicly endorse candidates and urge others to support them (off duty).
6. Solicit contributions to the PAC of a Federal employee organization to which both the employee and the donor belong (off duty).

ADDITIONAL ACTIVITIES EMPLOYEES COULD DO UNDER THE H.R. 20

1. Run for and hold public office (off duty).
2. Solicit contributions (off duty).

But for the provisions dealing with running for office and soliciting contributions, the House bill and S. 135 are identical. Both renounce the principle of a neutral, nonpolitical federal workforce. Both are oblivious to the expectations, pressures, and coercion that would be borne with this legislation. Both would strike the keystone from the arch of our merit system. Both would scuttle the only remedy that has worked to vanquish the evils of the spoils system.

This legislation should be rejected.

WARREN B. RUDMAN.
BILL COHEN.
PETE WILSON.
BILL ROTH.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 24, 1989.

Hon. JOHN GLENN,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for giving us the opportunity to express the views of the Department of Justice on S. 135, the "Hatch Act Reform Amendments of 1989." The Department strongly opposes legislation that would reduce the current restrictions on partisan political activity by federal civil servants.[1] Senior advisors to the President would recommend a veto of this bill if it were presented to the President.

Our opposition is grounded in a firm belief that it is impossible to allow active partisan campaigning by the vast majority of federal employees and, at the same time, protect two fundamental principles central to the operations of the Executive Branch of the Federal Government: the nonpartisan administration and enforcement of federal laws, and advancement in the federal civil service based solely on merit.

If enacted, S. 135 would repeal substantial portions of the Hatch Act, 5 U.S.C. § 7324 ("the Act"), which forbids certain active partisan political activities on the part of federal employees (and certain state employees whose positions are funded by federal grants).[2] We believe that such a course would be a serious mistake because we remain convinced that it would result in a tragic re-politicization of the federal civil service to the detriment of the vast majority of federal employees, as well as to the public policies and programs that they implement.[3] This, in turn, would seriously jeopardize public confidence in government and increase demands on already overburdened prosecutorial resources.

I. THE HATCH ACT

While the purpose of S. 135 is to restore the right to participate in the Nation's political processes to federal employees, in fact, fed-

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[1] S. 135 is essentially identical to the final version of H.R. 3400, the "Hatch Act Reform Amendments of 1988," considered by the 100th Congress, and also opposed by the Department.

[2] In 1974, Congress repealed most of the federal restrictions on partisan campaigning by state and local employees who administer federal programs imposed by the 1940 "Little Hatch Act." *See* 5 U.S.C. § 1501 *et seq.* By this time, most of the states had enacted legislation protecting public employees against political abuses and, thus, the federal bar had become superfluous. We are aware of no major policy shift at the state level backwards, toward the universally discredited political "spoils" system. On the contrary, the trend today in public administration at the state and local level continues toward a more merit-based, and less political, civil service.

[3] Similar legislation has been passed by the House of Representatives as H.R. 20, which resembles the original House version of H.R. 3400 in the 100th Congress. While there are some significant differences in the proposals, the Department of Justice opposes enactment of H.R. 20 for many of the same reasons that it opposes S. 135.

eral workers already have significant political rights under the current Hatch Act. For example they may:

—register to vote and vote;
—contribute money to partisan political campaigns;
—express their views in private and in public (though not in a concerted way to elicit support for a candidate or party);
—run as an independent candidate in certain partisan contests in designated areas with a high concentration of federal employees;
—attend political conventions and rallies as a spectator;
—assist in nonpartisan voter registration drives;
—campaign for or against political referendum questions;
—participate as a nonpartisan poll-watcher or election judge;
—attend political fund-raising functions;
—wear political buttons (off duty or, subject to certain agency restrictions, on duty); and
—participate in *nonpartisan* campaigns.

However, federal employees may not take an active role in *partisan* political activities. Specifically, the Hatch Act forbids employees to:

—run as partisan candidates in elections for public office;
—hold office in political clubs or parties;
—solicit or handle political contributions or organize partisan fund-raising activities;
—make speeches or engage in other campaign activities to elect partisan candidates as an agent of the candidate's campaign organization; and
—circulate partisan nominating petitions.

S. 135, THE "HATCH ACT REFORM AMENDMENTS OF 1989"

If it were enacted into law, S. 135 would amount to a vitual repeal of the Hatch Act. It would *permit* federal employees to:

—hold office in a political party;
—work in partisan political campaigns or in party organizations;
—publicly endorse partisan candidates and urge others to support them; and
—solicit political contributions from fellow federal employees in certain circumstances.

The Hatch Act was passed in 1939, but its roots are much deeper. For example, the political activities of some of those in the Executive Branch disturbed Thomas Jefferson, who issued an order stating in part that "[t]he right of any officer to give his vote at election as a qualified citizen is not meant to be restrained . . . [however] it is expected that he will not attemp to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." [4]

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[4] 10 J. Richardson, *Messages and Papers of the Presidents* 98 (1899), *quoted in United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 557 (1973) (dismissing a constitutional challenge to the Hatch Act as a violation of the First Amendment). Justice White presented a concise history of the Act in this opinion, *id.* at pp. 557-63, from which this discussion is largely drawn.

In spite of Jefferson's concerns about mixing partisan politics and regular federal service, the political spoils system flourished in succeeding decades and remained the rule until after the Civil War. In 1871, Congress authorized the President to establish a true civil service of federal employees.[5] This was followed by the Civil Service Act of 1883, known as the Pendleton Act,[6] which in Rule 1 declared that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any right to use his official authority or influence to coerce the political action of any person or body." [7]

Problems with political activity by government workers continued, and the Civil Service Rules were frequently revised. In 1907, under President Theodore Roosevelt, Rule 1 was amended to prohibit executive civil servants from using their "official authority or influence for the purpose of interfering with an election or affecting the result thereof." [8] Finally, the experience of the 1936 and 1938 elections convinced Congress that the prohibition against taking an active part in political management and campaigns should be extended to the entire federal service.[9] The bill introduced to remedy this problem became the Hatch Act, named for its main proponent, Senator Carl Hatch (D-NM).[10] It has since been amended on several occasions, but its essential features have remained intact for almost 50 years.

The principle that the *privilege* of federal employment constitutionally justifies restrictions on partisan political activity also has been twice expressly recognized by the Supreme Court. In *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 98 (1947), the Court upheld the constitutionality of the Hatch Act and noted that "Congress recognizes danger to the [civil] service in that political rather than official effort may be channeled through political connections." In *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 565–67 (1973), the Court noted that "[n]either the right to associate nor the right to participate in political activities is absolute," and found that Congress was justified in concluding that "substantial barriers should be raised against the party in power—or the party out of power, for that matter—using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns."

We believe that the changes proposed in the Senate bill, even more than those proposed in the House version (H.R. 20), would invite an unacceptably dangerous degree of politicization in the federal workplace.[11] The types of conduct involved could run the

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[5] 16 Stat. 514.
[6] 22 Stat. 403.
[7] 22 Stat. 404.
[8] Twenty-fourth Annual Report of the Civil Service Commission 104 (1908), *cited in Letter Carriers, supra*, 413 U.S. at 559.
[9] Earlier civil service rules had been confined to the competitive classified service. *Id.*
[10] 53 Stat. 1147.
[11] Although similar, S. 135 and H.R. 20 differ in several significant respects. For example, H.R. 20 appears to allow some off-duty solicitation of political contributions, while the Senate bill would specifically allow free solicitation among employees who are members of the same federal employee organization for the purpose of supporting the organization's multicandidate political committee. (*See* § 7323(2)). On the other hand, H.R. 20 would allow federal employees to

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gamut from informal political commentary to outright pressure on subordinates to "volunteer" to help in a campaign or contribute to an election fund. Of great concern to us, in particular, is proposed § 7323(2), which would permit federal employees belonging to federal employee organizations to solicit and receive contributions from fellow union members for the organization's multicandidate political committee. Such activities are federal crimes under current law. 18 U.S.C. § 602 makes it a crime to solicit, and 18 U.S.C. § 603 makes it a crime to make, any prohibited political contribution. This dual prohibition is intended to assure that employees are doubly shielded from coercive political shakedowns.

While it may be argued that by becoming members of employee organizations, the affected federal employees have agreed to expose themselves to such activities, this is not necessarily the case. The decision to join a federal employee union should not have the result of subjecting them to unwanted pressures from which they would otherwise have been immune. Further, in addition to deepening the gulf between federal employee organization members and non-members, this distinction between when solicitation either is or is not a crime, depending upon individual employee affiliation, will be extremely difficult to enforce. Moreover, prosecutions of infractions of these laws could be expected to multiply, since opportunities for conduct which might be a violation would be substantially increased.

The current bill includes several provisions, specifically §§ 7323(1) and 7324, which, although theoretically intended to prevent abuses, will be ineffective in achieving that goal as a practical matter. Further, these provisions would be virtually impossible to enforce effectively, and could invite a flood of litigation by disgruntled employees. In our view, these prohibitions would add little other than confusion to existing statutes which make certain kinds of coercion and misuse of authority a criminal offense.[12]

It is important to emphasize that the Department's role in matters involving political corruption of public personnel and programs is generally confined to criminal prosecution of aggravated violations of federal criminal statutes. *See e.g.,* Chapter 29 of Title 18 of the United States Code. The development of factually significant cases in this area suffers from two major problems. The first problem lies in the fact that individual victims of patronage schemes rarely come forward, either because the victims agree with the politics of the person pressuring them, are part of the same political machinery, or because the relative "cost" of submission on an individual level is low (*i.e.,* stuffing political mailings of purchasing a $50 fundraising ticket compared to the possible cost

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run for public office in a partisan election and even creates an entitlement to unpaid leave in order to allow the employee to do so. (*See* H.R. 20, § 7326) S. 135 would prohibit such activity.

In two important respects, H.R. 20 includes important provisions lacking in S. 135: (1) H.R. 20 would prohibit the partisan use of "official information obtained through or in connection with" federal employment unless the official information is available to the general public (*See* H.R. 20, § 7323(b)); and (2) H.R. 20 defines the nature of "official authority or influence," the partisan use of which is prohibited by both bills, to include promising to confer and conferring any benefit (such as any compensation, grant, contract, license, or ruling), or threatening reprisals (such as deprivation of any compensation, grant, license, or ruling), and approving, recommending processing, or taking personnel actions. (*See* § 7323(c)).

[12] *See, e.g.,* 18 U.S.C. §§ 595, 598, 600, 601, 602, 603, 606, and 607.

of complaining and displeasing their supervisors—possibly jeopardizing their jobs).

The second major problem the department must overcome to prosecute successfully these types of crimes is the fact that political threats and intimidation are rarely communicated in clear and unambiguous terms. The issue of coercion is invariably subtle. The prosecutor must therefore attempt to identify additional witnesses who can testify that they also received similar "threats" from the identified suspect. Our experience over the years is that when patronage abuses are actually reported they generally involve isolated instances, and often disgruntled employees, who complain of adverse job consequences by their supervisors because of their failure to comply with political demands imposed upon them. Such one-on-one witness cases are not conducive to criminal prosecution in federal court. The absence of large numbers of federal *criminal* prosecutions of patronage corruption thus does not indicate that the problem does not exist, but that it is generally extremely hard to prove.

The experience which this Department has had over the years enforcing the criminal laws dealing with illegal patronage practices has demonstrated quite graphically that there is a definite—and sinister—link between lack of civil service protections, on the one hand, and the occurrence of abuse on the other. The dynamics by which most government offices operate—and the fact that all government offices are in the last analysis subordinate to the political process—inevitably leads to the strong temptation on the part of many senior public administrators to use subtle, and often overt, pressure to transform the rank and file implementors of public programs and policies into political cadres. It is imperative that these forces be checked. The fact that such abuses are comparatively rare in the federal system, but no uncommon in many state and local government agencies, is a telling testament to the wisdom, efficacy, need, and purpose of the present federal Hatch Act.

Several examples of patronage abuses at the state and local level which have been investigated by this Department in the very recent past will illustrate the magnitude of the problem the Hatch Act has successfully kept from the federal door step:

In 1975, Congressman J. Edward Roush of Indiana testified before a House subcommittee in support of increased penalties under 18 U.S.C. §§ 600 and 601, at which time he provided the Congress with several examples of specific written demands from the party in power in his home State to rank and file government personnel (many of them firemen, road laborers, and the like) for the political donation of a percentage of their government salaries.

In 1985, a Special Federal Grand Jury in the Northern District of Illinois (Chicago) issued a report on the dynamics of the fraudulent election practices for which Chicago has until recently been infamous. After several years of hearing testimony, and after returning over 65 indictments charging Chicago officials with fraudulent voting practices, this grand jury determined that the driving force behind voter fraud in Chicago was the guest for patronage—*e.g.*, the power of the winning political faction to control the jobs of rank and file municipal personnel and award benefits to its "friends." This vicious patronage system produced corrupt govern-

ment, and required aggressive political work by even the most mundane public employees in order to obtain—or retain—municipal jobs.

Two County Commissioners in Clark County, Indiana were indicted and convicted in Indianapolis during 1986 for overtly threatening a large group of highway laborers with the loss of local County jobs if they did not agree to make political contributions to the party in power. Several laborers who refused to contribute were either summarily fired, or simply left their jobs on their own accord knowing that termination was the inevitable consequence of refusing to go along with such demands. This investigation also uncovered several other situations where Clark County employees—including at least one paramedic—were punitively transferred to job sites that were far removed from their homes and children because of the employees' lack of support for the incumbent political faction.

During recent months, the Criminal Division has transferred two major patronage matters to the Office of Special Counsel (OSC) for administrative enforcement under the so-called "Little Hatch Act" (5 U.S.C. §§ 1501 et seq.) Extensive criminal investigations, however, failed to produce sufficient evidence to support criminal charges in these cases—mainly for the reasons summarized previously in this letter. Both of these matters involved superior political appointees soliciting political contributions—usually in the form of dinner tickets—from clerks and administrative personnel. In one of these cases OSC succeeded in obtaining meaningful penalties (including debarment from future public employment) against the Director of Personnel of the Akron Municipal Housing Authority and two of her subordinates. *See Special Counsel* v. *Parnell*, 37 M.S.P.R. 184 (1988). In the other case, OSC is presently seeking similar penalties against several political and senior supervisory employees of the Niagara Frontier Transportation Authority for doing much the same thing. In both these instances, OSC has been successful in obtaining administrative sanctions against plainly unlawful behavior largely because the Little Hatch Act is on the books, and the evidentiary requirements of this administrative statute are far less demanding than those applicable to criminal proceeding under statutes such as 18 U.S.C. §§ 600, 601 and 595.

As a result of OSC's recent successes in this regard, the Criminal division is actively engaged at the present time in seeking ways to include OSC in the overall enforcement of the Federal patronage laws on the local and State level. Accordingly, the number of administrative cases such as the ones just discussed can be expected to increase in the near future—if, of course, S. 135 does not pass and the Hatch Act remains an effective enforcement tool.

Two months ago, at the end of May, 1989, a federal grand jury in Newark indicted the incumbent mayor, and an incumbent city councilman, of the township of Guttenberg for terminating the services of two exemplary police officers, and a 76-year-old school crossing guard. These public servants had refused to perform partisan political services for the incumbent city administration. This case, which is presently awaiting trial in Newark, was made possible because of the willingness of at least three of the victims to come forward and complain directly to the United States Attorney

in Newark, through an "800" telephone number which the District of New Jersey has recently put in place.

This recent history supports our firm conviction that any relaxation of the Hatch Act's politicking ban will substantially diminish the protections which federal employees currently enjoy against political pressure, while affording no realistic expectation that the void thus created can be filled by the federal criminal justice system. The Department of Justice remains convinced that nothing short of an absolute bar on active partisan political activities by federal civil service employees will adequately protect the public's interest in the fair and impartial administration of government programs and policies, and the employees themselves from more or less subtle pressure by their superiors. As noted above, violations of the criminal laws outlined above are notoriously difficult to prosecute because coercion in the workplace is hard to prove. Attempted coercion usually occurs out of sight of any witnesses, when none other than the alleged victim and perpetrator are present. The line between conduct that amounts to pressure and conduct that does not is very fine. Experience has shown that the only way to prevent abuse in this area is by declaring the entire field offlimits.

In addition to the specific concerns outlined above, the overall effect on the general public's confidence in the fair and impartial administration of the laws could be devastating, particularly if federal employees performing law enforcement or other sensitive government functions are not exempted from the proposed relaxation of the Hatch Act requirements. If it appears that an official of Party A has misappropriated funds, it will not inspire public confidence to learn that the local U.S. attorney's office charged with investigating the allegation is headed by the official's campaign manager—or, in contract, by the campaign manager for the candidate the official defeated.[13] If a federal agency's employees' PAC endorses a presidential candidate, and he loses the election, the public will justly wonder how faithfully that department will carry out the new President's programs. If an agency manager goes on record supporting (even through a "multicandidate political committee"), a candidate who proves successful at the polls, and subsequently that agency manager is promoted, it will surely promote increased public cynicism.

Furthermore, the increased political clout of public officials who might also serve within the hierarchy of national political committees should not be underestimated. For example, although he could not himself run for office under S. 135, the head of the Federal Election Commission could be the National Chairman of one political party or the other. This surely would not inspire confidence by

[13] It should be noted that the Department of Justice currently imposes its own rules, more stringent than the Hatch Act, which would prohibit a U.S. Attorney from engaging in such activities, even if the Hatch Act were repealed. The Department of Justice holds even its presidential appointees to the standards which apply to the rank-and-file, reasoning the the public's faith in fair and impartial law enforcement requires them to shun every appearance of partisan politics. *See* Memorandum from Attorney General William French Smith to all Department of Justice Offices, Boards, Divisions, and Bureaus (Feb. 13, 1984) (advising *all* Department of Justice employees, even those exempt from the Act, to refrain from participating in partisan politics). However, leaving such regulation to departments and agencies alone is undesirable because such rules can be easily changed and could produce uneven results.

members of the opposite party in that official's ability or desire to impartially administer the election laws.

The list could go on and on. Two principles central to the operation of the Executive Branch—the impartial, nonpartisan administration and enforcement of federal laws, and advancement in the federal service based solely on merit—would certainly be threatened and could well be extinguished by the adoption of S. 135. Safeguards against real abuse would be virtually unenforceable. In short, S. 135 is an open invitation to political corruption.

Finally, in addition to the policy and practical concerns discussed above, S. 135 raises serious constitutional concerns insofar as it limits the ability of most senior *political appointees* to engage in political activity. For example, § 7324 would place sweeping restrictions on the ability of many senior presidential appointees, the individuals primarily responsible for implementing the President's program, to engage in "political activity" while "on duty." We take little comfort from the fact that this prohibition does not apply in the case of the highest level appointees and presidential aides (those paid from the Executive Office of the President appropriation or appointed with the advice and consent of the Senate), if "the costs associated with that political activity are not paid for by money derived from the Treasury of the United States." (*See* § 7324(b)(1)). This qualification is of very uncertain value given that effective implementation of a President's program depends upon many non-cabinet level appointees, that all appointees' salaries are ultimately paid by the Treasury, and given that a wide variety of official activity of these appointees might be regarded as "political." The term "political activity" is nowhere defined in the Bill. There is, for example, no suggestion in the proposal that this term was intended to include only the kinds of partisan campaign activities for which appropriated funds may be unavailable under existing law. Restrictions on the partisan political activity of such high level government officers in questionable under both Article II of the Constitution (as an impediment to the exercise of legitimate Executive authority),[14] and the First Amendment.[15]

In sum, we conclude that an unintended but nevertheless certain result of this legislation would be to seriously undermine the nonpartisan nature of the federal workforce. Ultimately, S. 135 would lead to the re-politicization of the federal civil service, and an unfortunate retreat into the very worst aspects of public administration from the last century. One of the justifications given in 1939 by Senator Carl Hatch for restricting the political activities of civil servants applies to the same extent today: It is simply impossible to

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[14] Supreme Court precedent establishes that Congress may not interfere with the President's ability to carry out his constitutional responsibilities. *See, e.g., Hart* v. *United States,* 118 U.S. 62 (1886); *United States* v. *Klein,* 79 U.S. (13 Wall.) 128 (1872), holding unconstitutional congressional attempts to interfere with the President's pardon power. Even when Congress acts pursuant to its appropriations power, its authority is not absolute. Congress may not, for example, use its appropriations power to establish a religion, *Flast* v. *Cohen,* 392 U.S. 83, 104–105 (1968), or to diminish the compensation of federal judges, *United States* v. *Will,* 449 U.S. 200 (1980). By the same token, Congress' appropriations authority many not be used to intrude upon the President's Article II powers.

[15] *See, e.g., Branti* v. *Finkel,* 445 U.S. 507, 519 (1980) (recognizing the distinction between ministerial and policymaking officials); *Elrod* v. *Burns,* 427 U.S. 347, 367–69 (1976) (recognizing that different First Amendment considerations apply to policymaking officials as opposed to nonpolicymaking employees).

draw the line between voluntary and coerced political activity. 86 Cong. Rec. 2626 (1940) ("I defy * * * [anyone] to draw that line"). Allowing political activities by the federal civil service will inevitability harm the merit civil service and the people our Government serves.

For these reasons, the Department strongly opposes this legislation. The Office of Management and Budget has advised that there is no objection to the presentation of this report to the Congress and that S. 135 is not in accord with the program of the President.

Sincerely,

CAROL T. CRAWFORD,
Assistant Attorney General.

MINORITY VIEWS OF SENATOR WARREN RUDMAN

The minority views I signed along with Senators Roth, Cohen and Wilson thoroughly document the many reasons to vote aganist S. 135, and I shall not repeat those here. I would, however, like to stress some of the points touched on in those views.

First, the casual observer viewing the vote of the Committee on Governmental Affairs may come to the conclusion that this issue is subject to partisan or ideological divisions. That is not the case.

During the late 1970's, one of the most noted opponents of predecessor bills was Senator Ribicoff of Connecticut, a highly respected liberal and a former Chairman of this Committee. Moreover, legislation to weaken the Hatch Act is opposed by an unusual and diverse coalition of organizations including Common Cause, the American Bar Association, the Chamber of Commerce, and the American Farm Bureau Federation. In fact, the only non-federal employee organization to support weakening current law is the American Civil Liberties Union which has long held the position, notwithstanding Supreme Court decisions to the contrary, that the current law is unconstitutional. Clearly, concern for the preservation of the integrity of the civil service transcends ideology. (As the joint minority views document, it is also a mistake to assume that all federal employees support this change.)

Second, this is not an argument about abstract public policy positions. S. 135 will, if enacted, have real consequences on the lives of civil servants and the quality of service provided to the public.

One need merely look at recent developments in Arlington, Virginia for a preview of life in the federal government without a strong Hatch Act. A 1987 election in that county featured a sheriff being challenged by one of his former deputies. Following the incumbent's re-election, he gave a "retire now or be demoted" ultimatum to seven of his deputies who had publicly supported the challenger.

This action, which was the subject of a judicial challenge and ultimately settled out of court, is noteworthy only for the sheriff's bluntness. In more subtle forms, it will become the norm if S. 135 becomes law. Politics is an emotionally charged enterprise, and it is all too tempting to use whatever tools are available.

Those who argue that other provisions of federal law provide adequate protection for federal employees are ignoring the innumerable ways in which supervisors can retaliate against subordinates for taking part or *refusing to become involved* in political activity. Such steps can involve promotions, job ratings, and job assignments, to name a few. The current Hatch Act was in part a response to documented abuses in the Works Progress Administration which affected individual civil servants and public integrity in the process of government.

The temptation to allow political considerations to interfere with what are supposed to be apolitical, merit-based decisions will not just lie with an incumbent administration or individual public servants, but also with Members of Congress who are continually running campaigns supported in large part by volunteers. It is easy to imagine some Members, in an effort to help a federal employee who worked on their campaign, putting pressure on federal agencies to give those individuals favored treatment. Civil service protections and statutory requirments for decisions on the merits are not much of a hurdle in the wide range of matters where subjective factors must be weighed.

George Santayana's famous remark, "those who cannot remember the past are condemned to repeat it," applies with full force to this measure. Enactment of S. 135 will place the federal government, and all who it affects, firmly on an inadvisable course. And, after a few scandals, the Senate will be debating legislation to return to today's status quo. For these reasons, and those stated elsewhere, S. 135 should be rejected.

WARREN B. RUDMAN.

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